

MEMORANDUM

To: Members of the Florida Senate

From: Benjamin H. Hill, III

Date: January 20, 2003

Re: Art. X, § 20, Fla. Const. (Florida's Smoking Amendment)

Florida's Smoking Amendment

On November 5, 2002, Article X of the Florida Constitution was amended to add a new Section 20, which prohibits tobacco smoking in enclosed indoor workplaces (the "smoking amendment"). The smoking amendment defines "enclosed indoor workplaces" as "any place where one or more persons engages in work, and which is predominantly or totally bounded on all sides and above by physical barriers . . . without regard to whether work is occurring at any given time." "Smoking" is defined as "inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco and any other lighted tobacco product." The smoking amendment provides limited exemptions for private residences (except those being used commercially to provide childcare, adult care or health care services), retail tobacco shops, designated smoking guestrooms at hotels and public lodging establishments, and stand-alone bars. Consequently, with the exception of the exemptions identified, the smoking amendment prohibits smoking in all other enclosed indoor workplaces in Florida.

The smoking amendment directs the Legislature to enact legislation to implement the amendment "consistent with its broad purpose and stated terms," and having an effective date no later than July 1, 2003. While the amendment allows the Legislature to enact "more restrictive" regulations for tobacco smoking, the amendment does not appear to permit the Legislature to adopt additional exemptions, or moderate the impact of the amendment.

The Cigar Industry in Florida

The cigar industry in Florida is an industry whose heritage is at the very foundation of Florida's economic and cultural history. More than 27 local, national and international companies are involved in the development, manufacture, importation, sale and distribution of cigars and cigar leaf tobacco. These companies maintain their offices and facilities in Florida. In 2001, Florida-based manufacturers produced more than 46% of the more than 2 billion little cigars manufactured in the United States, and more than 40% of all cigars manufactured in the United States.¹ Total production for 2001 was 5.6

¹ At the time this memorandum was prepared, the final production numbers for 2002 had not been published.

billion large and little cigars. More than 424 million large cigars, and 34 million little cigars were imported into the ports of Tampa and Miami in 2001, representing 78% of the large cigars, and 50% of the little cigars imported into the United States in that year. The wholesale price for all cigars manufactured in Florida in 2001 is estimated at \$400 million. With respect to cigar leaf tobacco, two Florida dealers (Oliva Tobacco Co. and A.S.P. Enterprises, Inc.) deal with more than 50% of the leaf tobacco used in the United States for cigars.

Florida's cigar industry employs more than 2,500 people with a cumulative payroll in excess of \$90 million per year. In addition, Florida's cigar industry annually engages in more than \$75 million worth of business with other Florida-based companies servicing the cigar industry. Thus, the loss of the cigar industry in Florida would negatively impact the businesses that work in partnership with the industry, including, but not limited to box manufacturing, paper printing, trucking, maritime, Florida's seaports and petroleum industries.

Beyond being an economic mainstay in Florida, the cigar industry is credited as being one of the key economic forces for the State's history and cultural development. The cigar industry traces its roots to the days of the Spanish rule in the 16th century. Likewise, the development of Tampa and Key West in the 19th century (as well as Miami to a lesser extent) is linked to the growth of the cigar industry and the migration of Cuban cigar workers.

How the Smoking Amendment's Affects Florida's Cigar Industry

Smoking cigars and burning tobacco are essential steps in the manufacture, development, distribution and sale of cigars and cigar leaf tobacco in Florida. Everyday, as a integral part of carrying on their businesses, the cigar industry tests (smokes) their products to ensure the quality of cigars and cigar leaf tobacco, to evaluate manufacturing quality, to meet industry standards, to develop new products, and to ensure compliance with federal laws.

Cigar production begins with the selection of tobacco leaves. Tobacco leaf buyers burn the tobacco leaves to test the duration of the burn, aroma, and the quality of the tobacco ash. In addition, buyers wrap tobacco wrapper leaf samples around cigars and smoke them together to evaluate the quality of the leaf and to determine the uniformity and speed of the burn.

During the manufacturing phase, employees at the manufacturing facilities randomly smoke cigars for testing purposes on a regular basis to evaluate the taste, burn consistency, ash color, ash cohesion, moisture content, draw, texture, flavor and room aroma of cigars. They also test for water resistance of the tobacco wrapper and binder used in the manufacturing of cigars.

Cigars are also smoked during the development of new cigar products. Much like the production of a fine wine, there is substantial trial and error in the development of new cigar products. Employees smoke newly developed cigars on a regular basis to test and evaluate the product. Likewise, cigar companies evaluate competitor's cigar products in connection with the development of new cigars. Tobacco smoking is an integral part of the testing and evaluation of new cigar products. Other tobacco products, including pipe tobacco, cigar filler tobacco and tobacco leaf wrappers for cigars, are also tested and evaluated by smoking the tobacco.

Likewise, distributors and retailers regularly sample the cigars to evaluate them before purchasing the product. Tobacco smoking is a necessary part of this evaluation process because it is the purchasers' only means of evaluating and ensuring the quality of the product they are buying.

Finally, burning tobacco is necessary to ensure compliance with Federal regulations (ATF Procedure 73-5, Section 7.06). The Bureau of Alcohol, Tobacco, and Firearms classifies tobacco products with a pH less than 7 as cigarettes, and products with a pH greater than 7 as little cigars. (This classification has serious tax implications – little cigars are taxed at \$1.59 per 1,000 units, and cigarettes are taxed at \$17 - \$35.70 per 1,000 units). In order to determine the pH level of its little cigars, manufacturers use a smoking machine to smoke the cigars through a filter, and then test the pH levels from the filter. This test cannot be performed without smoking the little cigars.

In order to ensure accuracy and quality, all of the smoking tests described above must be conducted in an enclosed and controlled environment, and cannot be performed outside. If it were done outside, the climate, humidity and outside odors would interfere with the testing process. Conducting smoking tests outside would also interfere with the manufacturing process, where cigars are randomly selected from the production line and immediately smoke tested.

Conclusion

The smoking amendment prevents cigar manufacturers from testing and evaluating cigars, cigar leaf tobacco and pipe tobacco in Florida. It also prevents the development of new cigar brands and products, modification of existing products, and does not allow distributors and retailers to sample cigars. Consequently, it is impossible for the industry to comply with the smoking amendment while at the same time exercising the right to engage in a lawful business under Federal law.